

Supreme Court, U.S.
FILED

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No. _____

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In The
Supreme Court of the United States

WHITE BUFFALO VENTURES, LLC.,

Petitioner,

v.

THE UNIVERSITY OF TEXAS AT AUSTIN,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a public institution of higher education violate the First Amendment when it blocks delivery of unsolicited commercial email (spam) which is legally sent in all respects and complies with the Federal CAN-SPAM Act?
2. Does a public institution of higher education violate the Constitution of the United States when it blocks access from its on-campus network to a website on the world-wide web?
3. Does the CAN-SPAM Act preemption provision preempt the University of Texas at Austin's anti-spam policy?

PARTIES TO THE PROCEEDING

White Buffalo Ventures, LLC., a limited liability company organized under the laws of the state of Texas doing business as www.LonghornSingles.com.

The University of Texas at Austin, a subdivision of government, organized and operating as a public institution of higher education.

CORPORATE DISCLOSURE

Petitioner, White Buffalo Ventures, LLC. is a limited liability company organized under the laws of the State of Texas. White Buffalo Ventures, LLC. has no parent company and none of its shares is held by a publicly traded company.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on August 2, 2005, affirming the March 22, 2004 decision of the United States District Court for the Western District of Texas, Austin Division and is attached as Appendix A. The District Court's decision is attached as Appendix B.

STATEMENT OF JURISDICTION

This is an appeal pursuant to Fed. R. App. Pro. 4(a) from the Court's decision denying Plaintiff's Motion for Preliminary Injunction and Plaintiff's Motion for Summary Judgment and granting Defendant's Motion for Summary Judgment entered by the United States District Court for the Western District of Texas, Austin Division.

The Fifth Circuit notes that, "no Fifth Circuit panel has scrutinized any portion of CAN-SPAM, and no court in this country has considered the legislation's preemption clause. This is therefore an issue of very, very first impression."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I to the Constitution of the United States provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

The Can-Spam Act

15 U.S.C. § 7701 et seq. provides, in relevant parts, as follows:

(b) Congressional Determination of Public Policy. – On the basis of the findings in subsection (a), the Congress determines that –

- (3) recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source.

15 U.S.C. § 7702 et seq. provides, in relevant parts, as follows:

In this Act:

(1) Affirmative consent. – The term “affirmative consent”, when used with respect to a commercial electronic mail message, means that –

- (A) the recipient expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient’s own initiative; and
- (B) if the message is from a party other than the party to which the recipient communicated such consent, the recipient was given clear and conspicuous notice at the time the consent was communicated that the recipient’s electronic mail address could be transferred to such other party for the purpose of initiating commercial electronic mail messages.

15 U.S.C. § 7707 et seq. provides, in relevant parts, as follows:

b) State Law. —

(1) In general. — This Act supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

STATEMENT OF THE CASE

Petitioner is a limited liability company organized under the laws of the state of Texas. Petitioner operates several online dating services including www.LonghornSingles.com. On or about the 26th day of December, 2002, Petitioner launched LonghornSingles.com on the world-wide web. LonghornSingles.com has more than 7000 registrants and over 50 subscribers paying a recurring monthly fee for its service. Many of these non-paying registrants and paying subscribers have email addresses ending with "utexas.edu" and/or access the site from their on-campus internet connection provided, in whole or in part, at taxpayer expense, and at little or usually no charge to the user. University employees pay nothing for their email and internet access.

On or about February 21, 2003, Petitioner made a Texas Public Information Act request of the University of Texas at Austin for all "non-confidential, non-exempt email

addresses" held electronically by the university. The public data was sold to Petitioner by the university in April, 2003. The email addresses of students, staff, faculty and some alumni are available to the public on various university web sites and in its electronic directory. Nothing about the data provided by the university is confidential or exempt **AND** pursuant to the Family Educational Rights and Privacy Act, the university is required to maintain this public information of its students and disclose this information upon proper request in order to allow access to students for identification and communication purposes. All students have had the opportunity to "opt out" of this directory and to "hide" their contact information and had they done so, the university would not have disclosed their information. Additionally, pursuant to the Texas Public Information Act, the university disclosed all "non-confidential, non-exempt" email addresses of its staff and faculty pursuant to their status as state employees.

On or about April 28, 2003, Petitioner White Buffalo began sending targeted advertising to members of the university community making the recipients aware of the existence of LonghornSingles.com. These email messages were not sent "in bulk" but rather "serially, one-at-a-time." Recipients were given the ability to "unsubscribe" electronically and receive no further messages from LonghornSingles.com and some number of recipients did unsubscribe and have not received any further messages. Many recipients of these messages have registered, subscribed and contracted with LonghornSingles.com and have authorized recurring monthly credit card charges and periodic email updates from LonghornSingles.com.

On or about May 4, 2003, the Vice President for Information Technology at the university sent an email to

the webmaster at LonghornSingles.com expressing his displeasure about LonghornSingles.com advertising its service to the university community. A number of emails were exchanged between the Vice President and White Buffalo's CEO. Even though Petitioner made several requests for a meeting to discuss the university's concerns, the university refused to accept those invitations to meet.

Aware that Petitioner was in all respects compliant with the law concerning the sending of commercial email, on or about May 5, 2003, without any prior warning or notice to White Buffalo, and in violation of the laws of the State of Texas, the laws of the United States of America and the Constitution of the United States of America, the university blocked all incoming **AND** outgoing communication between Petitioner and university users including paid and paying subscribers, unpaid registrants and potential customers. White Buffalo was unable to contact its customers **IN ANY WAY**, to let them know about this dispute, to give them a free extension on their accounts, or to mitigate its damages in any way. The only conduit Petitioner had for contacting its customers is the email address the customer provided upon registration.

In blocking **ALL** communications between Petitioner and Petitioner's existing customers and potential customers, the university interfered with the contractual relationship between Petitioner and its existing customers with "utexas.edu" email addresses and the university abridged Petitioner's Freedom of Speech as guaranteed by the First Amendment to the Constitution of the United States of America and the constitutional rights of its users and customers.

The Family Educational Rights and Privacy Act (FERPA) requires that institutions of higher education maintain student information, "that would make the student's identity easily traceable," and to disclose that information if properly requested. Email addresses were sold to Petitioner by the university consistent with this Act and Petitioner has used this data in an appropriate way. Nothing about Petitioner's actions have burdened or in any other way negatively impacted the operations of the university's information technologies systems.

SUMMARY OF THE ARGUMENT

The state violated Petitioner White Buffalo Ventures' rights under the First Amendment to the U.S. Constitution when it blocked delivery of Petitioner's legally sent commercial emails. The university violated its students' rights under the U.S. Constitution when it blocked their ability to access www.LonghornSingles.com and when it blocked its students' ability to communicate with Petitioner from their on-campus internet connections. The university is enforcing a policy against Petitioner to which Petitioner is not in privity and which has been preempted by the CAN-SPAM Act, 15 U.S.C. §§ 7701 et seq.

ARGUMENT AND AUTHORITIES

First Amendment Argument

This case involves commercial speech and is therefore governed by *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980). First, in order to come under the *Central Hudson* test for First Amendment

protection, commercial speech must concern lawful activity and not be misleading. Respondent has never suggested that an online dating service such as LonghornSingles.com, or the numerous other online dating services which it does not block, constitutes unlawful activity. Petitioner has at all times abided by Federal Trade Commission guidelines for commercial email, the Texas Anti-Spam law and the federal CAN-SPAM Act. The university has never asserted that Petitioner's email messages were in any way illegal or illegally sent, nor has the university claimed or suggested that Petitioner's messages were fraudulent, confusing or violated federal or state law. The Fifth Circuit presumed the legality of Petitioner's emails based on the record, the parties' agreements and the absence of any challenge.

Next under *Central Hudson*, the Respondent must establish that the government interest to be served by the restriction on commercial speech is substantial. Petitioner concedes, as a general proposition, that protecting taxpayer property from misuse, specifically the potential overloading of a computer system, is a substantial state interest. And, there is no evidence in the record that Petitioner's legal emailing activity threatened the ability of the university to successfully operate its information technologies systems.

Regardless, the university must establish that the regulation directly advances the compelling interest, if any, and is no more extensive than necessary. The importance of this burden on the state was recently re-emphasized in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), "... a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve